# New York State
# Ethics Commission

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| **Advisory Opinion No. 97-20:** | Application of the lifetime bar of Public Officers Law §73(8)(a)(ii) to a former employee who seeks to serve on a Task Force which will review agency regulations for which she had varying responsibilities while in State service. |

## INTRODUCTION

This advisory opinion revisits Advisory Opinion No. 96-24R, which was issued by the State Ethics Commission ("Commission") upon an inquiry from Thomas A. Maul, Commissioner of the Office of Mental Retardation and Developmental Disabilities ("OMRDD"). That opinion concerned the application of the lifetime bar, found in Public Officers Law §73(8)(a)(ii), to a former OMRDD employee who is now employed by a not-for-profit corporation that is licensed and funded by the agency. The corporation designated the former employee to serve on a Task Force that will review and revise certain regulations that were related to her work while she was in State service. The Commission concluded in Advisory Opinion No. 96-24R that the lifetime bar prohibited the former employee from serving on the Task Force. However, after receiving that opinion, the former employee and OMRDD have supplied additional facts to the Commission. The former employee has requested that the Commission reconsider its previous opinion based upon the facts now known.

Pursuant to the authority vested in the Commission by Executive Law §94(15), the Commission, upon reconsideration, hereby renders its opinion that the lifetime bar of Public Officers Law §73(8)(a)(ii) does not prohibit the former employee from serving on the Task Force. However, she must recuse herself from all consideration of one particular segment of the regulations, as she wrote that segment while employed by OMRDD and it remains in effect.

## BACKGROUND

Pursuant to a request from Commissioner Maul, the Commission, on December 17, 1996, issued Advisory Opinion No. 96-24R, holding that the former employee was barred by the lifetime bar from serving on a Task Force created to review, revise and possibly revamp certain agency regulations. The Task Force will assist the agency in methodology revisions it plans to develop based on the Governor's Executive Budget, with its recommendations being likely to result in important policy decisions. The Commission, in its prior opinion, found, based upon the facts then available to it, that the former employee would be working on revising regulations, which were assumed to be largely unchanged, for which she wrote many amendments while she was serving at the agency. The Commission said that although she worked on distinct amendments, she had to have considered the regulations as a whole. It, therefore, held that, in serving on the Task Force, she would be rendering services for compensation in relation to the same transaction in which she personally participated while in State service. For the facts giving rise to the

opinion and the Commission's legal analysis, the reader is referred to Advisory Opinion No. 96-24R.

After the opinion was issued, the Commission was advised by the former employee that its understanding of the facts was not correct. She then submitted to the Commission a lengthy statement of her view of the nature of the work in which she had engaged while at OMRDD. The Commission has since worked with both the former employee and the agency to obtain a better understanding of the work she performed while at the agency and the work to be done by the Task Force. It is clear, based on the additional information the Commission has received, that the actual facts are somewhat different from those set forth in the Commission's prior opinion. The following represents a more accurate statement of the relevant facts.

To understand the nature of the former employee's work while at the agency, it is necessary to understand the difference between OMRDD's reimbursement regulations and the State Plan that is based on the regulations. As noted in the earlier opinion, the regulations concern reimbursement for the facilities and programs funded by the agency. They can be quite lengthy, although they vary considerably in detail and complexity, and they are written in a narrative form. They cover the State's basic formula for determining funding, but they may also include ancillary matters, such as an appeals process, reporting requirements, the basis of rates, or, if appropriate, allowable costs. When OMRDD adopts a new methodology, a new regulation describing the methodology, including related ancillary components, is promulgated, and amendments are made as necessary.

In addition to the regulations, OMRDD must prepare a State Plan. This Plan is submitted to the federal government to enable the agency to receive its fifty percent share of expenses covered by Medicaid. The agency cannot receive reimbursement from the federal government until the latter has approved the methodology used to calculate the allowable rates payable to the facilities that provide the services. The federal government requires the State Plan in order to review the State's methodology. Because the State's method of reimbursement is set forth in OMRDD's regulations, the State Plan must be consistent with those regulations, at least in those areas where regulations have been promulgated. In fact, the Plan is nearly identical to the regulations, with only minor non-substantive changes.

With this background, the Commission considers the work done by the former employee while she worked at OMRDD. For the Community Residence ("CR") program, Day Treatment program, Home and Community Based Service Waiver program and Article 16 clinic program, she participated in writing certain amendments to the regulations. However, these programs will not be considered by the Task Force on which she wishes to serve, and are, therefore, not relevant to the lifetime bar analysis set forth below.

For the Intermediate Care Facility ("ICF") program, which will be the subject of the Task Force's review, she played different roles with regard to the various aspects of the regulations and the State Plan. The ICF regulations, which comprise fewer than 100 pages of text, and the related State Plan include the following segments in which the former employee played a role:

1. Restructuring rate appeals.

2. Developmental center closure incentive program.
3. Changes in trend factor.
4. Limits on administration.
5. Facility assessment.
6. Yearly trend factors.
7. Continuation of the base.

For the State Plan, she worked on all of the above segments and was a point person for OMRDD in dealing with the New York State Department of Social Services and the federal government.

With respect to the regulations, she did not work on either Restructuring rate appeals or the Developmental center closure incentive program, for which, because it is solely an internal program, there are no regulations. She worked on the regulations for the other segments, and on a segment by segment basis, the following is a summary of her participation.

She had no direct role in the drafting of the regulations dealing with "Restructuring rate appeals," which constitute approximately one and one-half pages of text, although she worked on the corresponding State Plan amendments. She contends that she did not prepare the regulations, and that her work on the State Plan was merely to copy them. The two are nearly identical.

In the case of the "Developmental center closure incentive program," OMRDD did not draft regulations, as the matter was internal and did not apply to voluntary providers. The former employee's work on the State Plan was in conjunction with other OMRDD staff. She drafted a response to the then Commissioner of Social Services concerning issues raised by the federal government. However, because this is internal only, the Task Force on which she wishes to serve will not consider the program.

Concerning "Changes in the trend factors," OMRDD states that the former employee worked on the regulation, consisting of approximately two pages of text, as well as on the State Plan, but her work consisted only of changing a number representing the trend factor percentage, with the number provided by another source. She played no role in calculating the formula. During her employment with OMRDD, the former employee made numerical changes to the trend factors on numerous occasions. She was not the agency point person on questions from providers relating to the formula or the numerical changes in the regulation, as the formula was developed by the Department of Health. However, she would be one of the contacts on the State Plan with respect to the Department of Social Services and the Federal government. Since she left OMRDD, the agency has promulgated trend factor changes for 1995, 1996 and 1997. The amendments she inserted are applicable only to the years 1988-1994.

The agency states that the former employee wrote amendments to the regulation on "Limits of administration," which regulation is one paragraph consisting of a chart containing allowable maximum reimbursement rates for administrative costs per number of beds per region. The rates that applied when the former employee worked for OMRDD are no longer in effect. OMRDD revised this regulation, effective July 1, 1995, by providing a whole new set of allowable administrative costs. This revised the rates contained in the chart. New amendments were added

in July 1996 which established an efficiency adjustment as a new component. This resulted in an altering of the reimbursement to providers.

OMRDD states that the former employee worked on the regulation and the State Plan amendment for "Facility assessment," which is one sentence of text allowing for reimbursement based on a tax paid by providers. Although the sentence that the former employee wrote has been retained for historical purposes and has not been specifically repealed, it was superseded by a new sentence, effective April 4, 1996, which is currently applicable and reflects a change in the State's tax imposed upon ICF providers. The State Plan was also changed subsequent to the former employee's leaving the agency to reflect the change in the regulation.

Concerning "Yearly trend factors," consisting of approximately one page of text, the former employee prepared amendments, which consisted of inserting new numbers each year, that applied from 1988 through 1994. OMRDD has promulgated trend factor changes for 1995, 1996 and 1997. The former employee had no role in determining the annual trend factor percentage, which factor is developed by the New York State Department of Health and approved by the Division of the Budget.

Of the seven segments listed above, the only part of the ICF regulations that the former employee wrote and that are still completely intact, with no revisions or amendments, is "Continuation of the base," which is approximately two pages of text.

The Task Force that has recently been established to review, revise and possibly revamp the reimbursement sections of the ICF regulations will have as members agency staff as well as staff from several voluntary providers. The not-for-profit provider where the former employee is currently employed has designated her as its staff person assigned to the Task Force. Commissioner Maul is concerned that because of her prior work on the ICF regulations, the lifetime bar might preclude her participation. Commissioner Maul also anticipates that in the future, OMRDD will form similar task forces to review regulations related to CRs, Day Treatment facilities and the Home and Community Based Waiver program. Thus, the analysis contained in this opinion may have application beyond the immediate question addressed.

## APPLICABLE STATUTE

The applicable statute was quoted and discussed in Advisory Opinion No. 96-24R.

## DISCUSSION

Lifetime bar cases are decided on a case-by-case basis (Advisory Opinion No. 90-22). The fundamental question to be determined in such cases is whether the transaction on which a former employee proposes to work is the same as a transaction on which he or she worked while in State service. The Commission, therefore, must examine the role of the former employee and events subsequent to her leaving OMRDD with respect to each of the seven parts of the regulations to determine whether the Task Force's proposed consideration of the regulations would constitute part of the same transaction on which the former employee worked while at OMRDD.

(1) Restructuring rate appeals.

The former employee had no role in the drafting of these regulations, although she worked on the State Plan amendments. However, OMRDD states that the Plan mirrors the regulations and, in fact, the two are nearly identical. It appears that the former employee had no role in the development of policy or in the substantive decision making process. Taking the regulations that others authored and using those regulations to formulate the corresponding State Plan mirroring the regulations is a very limited role. The Commission finds that in playing such a role, the former employee was not directly concerned, nor did she personally participate in the transaction while in State service.

(2) Developmental center closure incentive program.

The former employee had no role in drafting regulations concerning the Developmental center closure incentive program, as regulations were not promulgated for this topic, but she worked on the State Plan. However, as this program will not be considered by the Task Force, her prior work would not be a bar to her serving as a member.

(3) Changes in the trend factor.

The former employee's work consisted only of changing the trend factor percentage, which is a number provided by another source, for years 1988-1994. The trend factors for those years are still in effect to the extent that current reimbursement incorporates past years' rates. However, the former employee played no role in calculating the formula. Such a minimal role should not be deemed to be personal participation in the transaction.

(4) Limits on administration.

OMRDD acknowledges that the regulations that the former employee wrote are no longer in effect since the agency has subsequently added new amendments which have entirely changed the way in which allowable administrative costs are calculated. Because the regulations she wrote are no longer in effect, the transaction on which she worked while in State service is no longer current. Any work she may seek to perform with respect to the regulations currently in effect would not be work on the same transaction on which she worked while in State service, and would, therefore, not be precluded by the lifetime bar.

(5) Medicaid assessment.

The amendments the former employee wrote are still intact, but for historical purposes only. This means that they are applicable only to old cases still pending. As in the case of "Limits on administration," the amendments on which she worked have been superseded by successor regulations, effective two years after the former employee left State service, which are now applicable. Therefore, she is not prohibited by the lifetime bar from working on any changes to the successor regulations.

(6) Yearly trend factors.

As with "Changes in the trend factor," the former employee only inserted new numbers, which numbers were developed by the Department of Health. Each year, a new annual percentage was calculated. As was noted for "Changes in the trend factor," such a minimal role should not be deemed personal participation.

(7) Continuation of the base.

The amendment that the former employee wrote with respect to "Continuation of the Base" is still intact and has not been subject to any revisions or further amendments. Thus, it is clear that she personally participated in the adoption of the amendment, and it is a transaction covered by the lifetime bar.

Having set forth the facts as now known to the Commission and the legal analysis based on these facts, the Commission must consider whether the result it reached in Advisory Opinion No. 96-24R should be modified. In the earlier opinion, the Commission had before it a situation where it believed that the former employee had personally participated in drafting discrete amendments to the overall regulations, and which it believed were still all in effect. In that opinion, the amendments on which she worked were not identified, and there was no mention that some of them had been superseded by changes since she left State service. Nor was there mention of her work on the State Plan or an explanation of how it differs from the regulations. Additionally, there was no mention that one of the segments -- the "Developmental center closure incentive program" -- would not be part of the work of the Task Force. Finally, the Commission had not been informed that, for some of the amendments, the former employee's work at the agency consisted of simply inserting numbers into a formula calculated by others.

The Commission held that the former could not serve on the Task Force, and said: "While she did not amend every part of the regulations, it is reasonable to conclude that in writing the many amendments in which she was involved she had to consider the regulations as a whole."

Based upon the facts now known to the Commission, the former employee would be barred from working on only Continuation of the base. While the Commission's prior decision was premised upon her working on various unspecified amendments to the regulations, the Commission now, with more details, understands that she is not barred from working on five of the six segments of the regulations to be considered by the Task Force. The regulations are not one undivided whole, but, rather, are individual segments very different in nature, with the commonality that they all concern reimbursement to ICFs. The Commission believes that it is not necessary to preclude the former employee from working on the Task Force to avoid the evil addressed by the lifetime bar. She can join the Task Force and work on all matters except Continuation of the base, from which she must recuse herself. This allows her to participate in areas where there is no reason to bar her, while, at the same time, preventing her from using her special knowledge of the regulations concerning Continuation of the base to the advantage of her current employer.[(1)]

## CONCLUSION

The Commission concludes that Advisory Opinion No. 96-24R is hereby modified so as to permit the former employee to serve on the Task Force without violation of the lifetime bar of

Public Officers Law §73(8)(a)(ii). However, she must recuse herself from all consideration from the segment entitled "Continuation of the base," as she wrote that segment while employed by OMRDD and it remains in effect.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the requesting individual who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion.

All concur:

Evans V. Brewster
Henry G. Gossel
Paul L. Shechtman
O. Peter Sherwood, Members

Dated: September 23, 1997

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**Endnotes**

1. It bears note that this is not an instance in which a State agency has named a former employee to serve, in a non-paid capacity, on an advisory board, commission or council. Nor does this opinion address issues that may arise in other circumstances when a State agency seeks volunteers to assist it as the agency carries out its responsibilities. Our decisional law permits such arrangements so that the State does not "lose the valuable services of [its] former State officers and employees with talents and willingness to continue in some aspect of public service." (See Advisory Opinion No. 93-13).